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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FRITZ G. BEYER,

Plaintiff and Appellant,

v.

WILLIAM BOYLAND,

Defendant and Respondent.

E046564

(Super.Ct.No. INC018842)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,
Judge. Affirmed.

Law Offices of Lawrence R. Bynum and Lawrence R. Bynum for Plaintiff and
Appellant.

Lubrani & Smith, Michael D. Lubrani and Lawya Rangel for Defendant and
Respondent.

Plaintiff and appellant Fritz G. Beyer appeals from a judgment entered following a
grant of nonsuit as to his claims for intentional infliction of emotional distress and

intentional interference with prospective economic advantage against defendant and respondent William Boyland. Beyer contends that nonsuit was improper because he submitted sufficient facts to establish a right to recovery under the theories pleaded. We hold that the trial court properly granted nonsuit on these claims. He also contends that we should read his complaint as encompassing a cause of action for intentional interference with contractual relations. Even if this theory has not been waived or forfeited for failing to assert it below, we reject this contention. Accordingly, we will affirm the judgment.

I. SUMMARY OF FACTUAL AND PROCEDURAL HISTORY

A. *Overview*

In 1998, Beyer befriended Dr. Jaroud B. Smith and his wife, Sonja Smith, and helped them organize their financial affairs. He obtained a power of attorney from the Smiths allowing Beyer to act as their attorney-in-fact for all purposes. After Sonia Smith died in 1999, Dr. Smith executed a revocable living trust (the Smith Trust) naming Beyer as trustee. Beyer, in his capacity as trustee *under* the Smith Trust, engaged Boyland, an attorney, to draft an agreement concerning a proposed sale of certain real property held in the Smith Trust. Instead of drafting the agreement, Boyland prepared a document revoking the Smith Trust (the trust revocation) and drafted a new trust document for Dr. Smith, both of which Dr. Smith signed. Axel Hirsch was named trustee of the new trust.

Beyer was served with the trust revocation in the evening of September 1, 1999. The following day, Beyer went to a Wells Fargo Bank branch where funds in the Smith

Trust were held. Beyer arranged for certain of these funds to be held by him in the form of a cashier's check payable to him and Dr. Smith. On September 3, 1999, he returned to the bank to, as he explained, "freeze remaining accounts." There, Beyer was arrested. He was released six hours later; no charges were made against him.

B. Procedural Background

In a first amended complaint, Beyer alleged causes of action labeled "Professional Malpractice," "Breach of Fiduciary Duty," "Intentional Infliction of Emotional Distress," and "Intentional Interference with Prospective Economic Advantage." In connection with the professional malpractice cause of action, Beyer alleged the following: Beyer was the trustee of the Smith Trust; Beyer employed Boyland to represent Beyer "as trustee/executor of the Estate of Jaroud B. Smith, in connection with the sale of certain real property" in Palm Springs; Boyland advised Beyer with regard to the transaction and undertook to represent him; and Boyland subsequently caused Beyer to be removed as trustee and executor, causing damage to Beyer.

The breach of fiduciary duty cause of action incorporates each of the allegations supporting the professional malpractice cause of action.¹ In addition, Beyer alleged that

¹ The cause of action for breach of fiduciary duty in the first amended complaint states that Beyer incorporates by reference "the allegations contained in the Seventh Cause of Action." The seventh cause of action is alleged against certain Palm Springs police officers and the City of Palm Springs for violation of civil rights. It does not include any facts pertaining to a breach of fiduciary duty by Boyland. In his original complaint, the seventh cause of action was the cause of action for professional malpractice. In that original pleading, the cause of action for breach of fiduciary duty incorporated the allegations of the seventh cause of action for professional malpractice. Thus, it is likely, and our analysis will assume, that in the first amended complaint, when

[footnote continued on next page]

Boyland, while acting as Beyer's attorney and in a "fiduciary relationship of great trust," used confidential information obtained from Beyer to have Beyer removed as trustee of the Smith Trust and executor of the will of Jaroud B. Smith.

For his cause of action for intentional infliction of emotional distress, Beyer alleged that Boyland engaged in a "continuous course of intentional, unlawful[,] and wrongful conduct designed to remove [Beyer] as trustee of the [Smith Trust] and as beneficiary under the [Smith will], and otherwise interfere with [Beyer's] relationship with [Dr.] Jaroud B. Smith so as to deprive [Beyer] of the benefits of such positions and relationships and to further the economic interests of defendants." The alleged wrongful conduct includes making false reports to police of elder abuse and theft, damaging Beyer's vehicle, assaulting and battering Beyer's fiancée, and using false information to influence Dr. Smith to remove Beyer as trustee of the Smith Trust. Beyer's cause of action for intentional interference with prospective economic advantage incorporates these allegations and adds that Boyland and others further disrupted the relationship between Beyer and Dr. Smith by barring Beyer from access to and contact with Dr. Smith, and "keeping [Dr.] Smith hidden from [Beyer]."

In 2006, Boyland moved for summary judgment or, in the alternative, summary adjudication of each of the causes of action alleged against him. As to Beyer's causes of

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Beyer referred to the allegations of the seventh cause of action in his claim for breach of fiduciary duty, he intended to refer to the allegations in the renumbered tenth cause of action for professional malpractice.

action for legal malpractice and breach of fiduciary duty, Boyland argued that these claims failed because Boyland did not have an attorney-client relationship with Beyer in his personal capacity. Boyland further argued that the causes of action for intentional infliction of emotional distress and intentional interference with prospective economic advantage fail because “the litigation privilege establishes a complete defense to these two causes of action” and because Beyer has failed to prove damages. The trial court granted Boyland’s motion for summary judgment.

In an unpublished opinion, we reversed the judgment and directed the court to enter an order granting Boyland’s motion for summary adjudication as to the causes of action for professional malpractice and breach of fiduciary duty, and denying summary adjudication as to the intentional infliction of emotional distress and interference causes of action. We held that, based on the evidence submitted in support of and in opposition to the motion, Boyland represented Beyer in his capacity *as trustee of the Smith Trust*, as distinguished from representing Beyer in his *personal* capacity; therefore, Boyland owed no professional or fiduciary duty to Beyer in his personal capacity. Because his action was brought by Beyer in his personal capacity only, his actions for professional malpractice and breach of fiduciary duty failed. We reversed the judgment, however, because Boyland failed to set forth supporting facts or citations to evidence in his separate statement as to the claims for intentional infliction of emotional distress and intentional interference with prospective economic advantage.

Following remand, the case proceeded toward trial on the two remaining causes of action. Prior to trial, the parties stipulated to a procedure whereby Beyer would submit a written offer of proof to the court and Boyland would then move for nonsuit based upon the offer of proof. At the time the court granted the motion for nonsuit, the court described this stipulation as follows: “It’s the expectation of the parties that this would go up to the Court of Appeal and that by stipulation between both sides the Court of Appeal would consider this offer of proof the same as if a jury were picked and that this evidence was presented in the case in chief and that the motion was then made before the defense presentation of any evidence and then granted.”

C. Beyer’s Offer of Proof and Boyland’s Motion for Nonsuit

The following is a summary of the written offer of proof submitted by Beyer, as amended pursuant to stipulation with Boyland.

Beyer was born in Germany in 1942. He became a United States citizen in 1974 and worked as a mechanic for United Airlines. After retiring from United Airlines, he owned and operated several businesses. In 1996, he sold his last business and retired to Palm Springs.

Beyer met Dr. Smith and Sonja Smith on New Year’s Eve 1997. Dr. Smith had limited mobility, and suffered from numerous chronic medical conditions, including complications from a stroke, Parkinson’s disease, and poor memory and hearing. Beyer believed Dr. Smith could not take care of himself. Sonja Smith, Dr. Smith’s wife, was obese and had respiratory and cardiac problems.

Beyer next met with the Smiths at their home in January 1998. They became friends over a period of numerous visits.

The Smiths told Beyer that Dr. Smith had accumulated wealth during his career, but needed assistance with handling their bills. At the Smiths' request, Beyer assisted them in organizing their financial affairs. He sorted through documents accumulated over the years, determined the location and status of bank accounts, and assisted them in keeping their accounts reconciled and with positive balances so that they could pay their obligations. The Smiths were very grateful to Beyer.

Beyer learned that the Smiths owned a house in San Leandro, California, which was unencumbered. Beyer suggested that the Smiths sell the house "and use the proceeds to alleviate their turmoil." To accomplish this, Beyer made approximately six trips to San Leandro between February 1998 and April 1999. The Smiths accompanied him on some of these trips.

Beyer assisted the Smiths by interviewing and hiring a real estate broker, performing repairs to the property, and advancing his own funds for the Smiths' benefit. He paid many of the Smiths' bills with his own funds and repeatedly loaned them money. The amount of his loans and expenditures exceeded \$30,000. To facilitate the payment of expenses, joint bank accounts in Beyer's and the Smiths' names were opened.

Sonja Smith became very ill and was hospitalized in April 1999. She requested that Beyer and his fiancée, Diane Saracino, take care of Dr. Smith. "Dr. Smith tearfully requested Beyer's assistance claiming that the County of Riverside had been to the

hospital inquiring of Dr. Smith with the intent of placing him ‘in a home.’” On April 18, 1999, the Smiths executed a durable power of attorney allowing Beyer to act as their attorney-in-fact for all purposes, including banking transactions.

Sonja Smith died on April 23, 1999. Thereafter, Dr. Smith and Beyer consulted with an attorney for estate administration advice, who referred them to Kay Wanner. Wanner met repeatedly with Smith and Beyer to discuss and prepare estate documents. Beyer reviewed and organized documents to enable Wanner to prepare comprehensive estate documents for the parties.

Smith voluntarily chose Beyer as trustee and death beneficiary of his living trust. (During his life, Smith was to receive all net income from the trust estate, and principal of the trust estate may be used only for Smith’s care, maintenance, or support.) Axel Hirsch was named to serve as trustee in the event Beyer was unable to serve. The Smith Trust was revocable by Smith at any time. Smith executed the trust document on May 7, 1999.

The proceeds from the sale of the San Leandro house, approximately \$240,000, were placed in checking accounts in the names of Dr. Smith and Beyer, individually. Dr. Smith created “portfolio accounts” with Wells Fargo Bank. The proceeds from the sale of the house were transferred into portfolio accounts that named Beyer as trustee.

During the time Beyer was assisting the Smiths, Axel and Petra Hirsch would visit the Smiths. The Hirsches, who resided in Germany, visited the Smiths a few times each year and stayed for a few weeks at a time. They were not United States citizens and spoke little or no English. While in the United States, the Hirsches’ expenses were paid

by Dr. Smith or his trust. The Hirsches drove Dr. Smith's car and stayed in a house owned by Dr. Smith (the Calle San Antonio house) without paying Dr. Smith.

To prevent further diminution of the Smith Trust by the Hirsches, Beyer, as attorney-in-fact and as trustee of the Jaroud Smith living trust, arranged for the sale of the Calle San Antonio house to the Hirsches. To consummate the transaction, Beyer sought legal advice from Boyland. Beyer met with Boyland at Boyland's office on August 19, 1999. Beyer was accompanied by Axel Hirsch, who did not speak during the meeting. Beyer told Boyland of his status as trustee of the Smith Trust and that "the trust desired to sell property to Axel Hirsch and his wife, Petra." Beyer told Boyland the purchase price for the property.

Boyland said "that he had never drafted such an agreement, but would spend a few hours conducting research to prepare it." He told Beyer he would need one week to 10 days to prepare the agreement and estimated the cost to be approximately \$600 to \$700. Beyer gave Boyland the trust agreement and the power of attorney authorizing the sale. "Beyer received legal advice from [Boyland] and Beyer believed he established an attorney-client relationship." Beyer called Boyland's office to inquire as to the status of the agreement, but never received a return telephone call or other communication from Boyland. Boyland never informed Beyer in writing that an attorney-client relationship did not exist.

Boyland does not have a written retainer agreement with the Hirsches or Dr. Smith. On or about August 30, 1999, Boyland drafted the trust revocation.² Boyland also prepared a new trust naming Hirsch as trustee and one of the beneficiaries. Boyland billed the Hirsches and Dr. Smith nearly \$15,000 for his services.³

Boyland prepared a trial brief allegedly on behalf of Dr. Smith and the Hirsches, which states: ““On August 30, 1999, Boyland met with his clients, Axel Hirsch and Petra Hirsch, and advised them against entering into the contract proposed by Beyer. Petra Hirsch took the copy of the Smith [T]rust from Boyland, and returned the next day, saying that Dr. Smith had denied signing the trust, and that Dr. Smith did not want Fritz Beyer as his trustee.’”

On August 31, 1999, Petra Hirsch went to the Palm Springs Police Department to lodge a complaint against Beyer. She spoke with a police officer and made accusations against Beyer. The officer stated in his report that Beyer “is conducting position normally. . . . No evidence of abuse present at this time. Trustee’s information not taken due to matter being civil.” (Bolding omitted.) Beyer was not informed of the allegations.

On September 1, 1999, Beyer received a telephone call from Dr. Smith’s housekeeper. The housekeeper told Beyer that the locks to Dr. Smith’s house were being

² The trust revocation is included among the documents Beyer submitted in support of the offer of proof. The document is signed by Jaroud B. Smith as trustor.

³ During the hearing on the motion for nonsuit, counsel for the parties stipulated that the following would be added with respect to Boyland’s bill: “The charges were billed before, during, and after the preparation of the revocation of Fritz Beyer’s trustee status of the trust. The bills reflect a rate of \$175.00 per hour.”

changed and that Dr. Smith, Dr. Smith's car, and the Hirsches were missing. Beyer immediately called the Palm Springs Police Department. He was told to go to Dr. Smith's residence and make a report from that location. Beyer went to Dr. Smith's home.

Beyer confirmed that the locks to the residence were being changed and that Dr. Smith was missing. He again called the police. The police officer who responded to the call told Beyer that a missing person report could be filed after 24 hours.

Beyer suspected that the Hirsches had abducted Dr. Smith and that they planned on draining Smith's assets. To "protect the cash assets of the estate," Beyer went to the Wells Fargo Bank where he and Dr. Smith held accounts. Beyer transferred \$200,000 from two joint accounts into another account, whose existence was unknown to the Hirsches. Boyland caused Beyer to be served with the trust revocation in the evening of September 1, 1999, thereby terminating his position as trustee.

The following day, September 2, 1999, Beyer contacted the Palm Springs Police Department and was referred to Riverside County's Adult Protective Services. He contacted that agency and "had a lengthy conversation about the events." Beyer then went to Wells Fargo Bank and spoke with a bank employee "about how to best protect the withdrawn funds." The employee told Beyer that a cashier's check made payable to both Dr. Smith and Beyer could only be negotiated by the two payees. Accordingly, a cashier's check was made payable to Beyer and Dr. Smith.

Later that evening, the Hirsches went to the Palm Springs Police Department and spoke with a police officer.

The next day, September 3, 1999, “Beyer went to the bank to freeze remaining accounts.” The Hirsches and Dr. Smith were there. Saracino (Beyer’s fiancée), who had been waiting in the car, ran into the bank screaming that Axel Hirsch attacked her. The police arrived and arrested Beyer based upon the report filed by Petra Hirsch. “Beyer was booked, fingerprinted, had his mug shot taken, interrogated and spent about six hours in custody.” “No charges were ever pressed against Beyer.”

Boyland testified at his deposition that, to his knowledge, he never represented the Jaroud B. Smith Living Trust as an attorney.

As a result of the actions taken to remove Beyer as trustee of the Smith Trust and the consequences following his removal, Beyer suffered severe emotional distress as evidenced by trouble sleeping, constant crying, irritability, his inability to concentrate on anything else, a major depressive disorder, an essential inability to function normally, and weight gain.

After Beyer submitted his offer of proof, Boyland moved for nonsuit. Following a hearing, the court granted the motion. The court explained that, based on the offer of proof, there was insufficient evidence to support the claims asserted against Boyland. Judgment was thereafter entered in Boyland’s favor.

II. STANDARD OF REVIEW

“A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff’s evidence before presenting his or her case. Because a successful nonsuit motion precludes submission of plaintiff’s case to the jury, courts grant motions for nonsuit only

under very limited circumstances. [Citation.] A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor. [Citations.] [¶] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor" [Citations.]" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839.)

"In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. 'The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' [Citations.] [¶] Although a judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is 'some substance to plaintiff's evidence upon which reasonable minds could differ' [Citations.]" (*Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at p. 839.)

III. ANALYSIS

A. *Intentional Infliction of Emotional Distress*

In order to recover for intentional infliction of emotional distress, a plaintiff must show: “(1) extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. [Citation.] Further, the conduct alleged ‘must be “so extreme and outrageous “as to go beyond all possible [bounds] of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’”” [Citation.]” (*Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1607-1608.) The ““extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. . . .”” (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 372 (*McDaniel*).)

The conduct that Beyer considers extreme and outrageous is, in essence, Boyland’s involvement in revoking the Smith Trust and thereby terminating Beyer’s role as trustee. Beyer contends that such conduct is outrageous because Boyland “held a position of authority over Beyer.” He relies upon *McDaniel, supra*, 230 Cal.App.3d, which states that the ““extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. . . . [¶] The extreme

and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.” [Citations.]” (*Id.* at p. 372.)

In *McDaniel*, a male family law attorney sued his female client for nonpayment of fees. The client cross-complained against the attorney for intentional infliction of emotional distress. In opposition to the attorney's motion for summary adjudication, the client submitted facts showing that the attorney made repeated sexual advances toward the client, including pinning the client against a wall and kissing her, as well as sexually suggestive remarks on numerous occasions. (*McDaniel, supra*, 230 Cal.App.3d at pp. 369-370.) After the client refused to have sexual relations with the attorney, the attorney failed to represent her interests, appear in court for her, or properly advise her of her rights. (*Id.* at p. 370.) The attorney also failed to return her calls to his office and eventually told the client that she would have had the right telephone number to reach him if she ““had played the game “the right way.””” (*Ibid.*)

The attorney argued that the conduct described by the client was insufficient as a matter of law to constitute outrageous conduct. (*McDaniel, supra*, 230 Cal.App.3d at pp. 369-370.) The Court of Appeal disagreed. After first discussing the fiduciary nature of the attorney-client relationship and explaining that an “attorney must act with the most conscientious fidelity,” the court explained: “Defendant had a special relationship with

plaintiff in that she was a client and plaintiff was her attorney representing her in a dissolution of marriage proceeding. Plaintiff was in a position of actual or apparent power over defendant. Defendant was peculiarly susceptible to emotional distress because of her pending marital dissolution. Plaintiff was aware of defendant's circumstances. The withholding by a retained attorney of legal services when sexual favors are not granted by a client and engaging in sexual harassment of the client constitute acts of outrageous conduct under these circumstances." (*Id.* at p. 373.)

McDaniel is easily distinguished. As we explained in our prior opinion (*Beyer v. Boyland* (Jan. 17, 2006, E036301) [nonpub. opn.]), Beyer, in the individual capacity in which he is suing Boyland, was never Boyland's client. The fiduciary relationship that existed between the parties in *McDaniel*, therefore, did not exist here. Beyer acknowledges this, but asserts that he "believed he was [Boyland's] client," and that "Beyer the trustee does not have a separate identity from Beyer the individual."⁴ However, even if Boyland held a position of authority over Beyer, his involvement in the termination of Beyer's position as trustee of the Smith Trust does not come close to being analogous to the conduct of the attorney in *McDaniel*. Indeed, there is nothing in the offer of proof to suggest that the revocation of the Smith Trust was wrongful; it is signed by Dr. Smith, as trustor, who had the power to revoke or amend the trust at any time.

⁴ Without resolving the metaphysical issue suggested by Beyer's statement, we note that *legally* Beyer the trustee does have a separate identity from Beyer the individual. As one authoritative author states: "A, as trustee, and A, as an individual outside the trusteeship, constitute two separate legal persons." (Bogert, *Trusts & Trustees* (3d ed. 2007) § 17, p. 240.)

Beyer argues, however, that Boyland acted wrongfully in preparing the revocation for Dr. Smith because Boyland admitted in his deposition that he did not represent “the trust.” Beyer infers from this that Boyland exerted undue influence on Dr. Smith in getting Dr. Smith to revoke Beyer’s role as trustee. The inference is not reasonable. Initially, we note that an attorney cannot have a trust as a client because “a trust is not a person but rather ‘a fiduciary *relationship* with respect to property.’ [Citations.]” (Cf. *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn. 3; see also *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 529.) However, even if a trust (as distinct from the trustor, trustee, or beneficiary) could be an attorney’s client, Boyland’s preparation of the trust revocation and a new trust document for Dr. Smith indicates that Boyland was acting as the attorney for Dr. Smith (the trustor), not “the trust.” Therefore, Boyland’s statement that he did not represent the trust itself is entirely consistent with representing Dr. Smith, the trustor, in connection with such matters. The statement in no way suggests any undue influence by Boyland.

In addition to Boyland’s involvement in the termination of Beyer’s status as trustee of the Smith Trust, Beyer also states in his opening brief that Boyland “communicated with the Palm Springs Police Department regarding the termination [of his status as trustee] and . . . wrote a bank involved in the manner and referenced pending litigation.” These facts, however, are not mentioned in Beyer’s offer of proof. Nor is Beyer’s reference to these facts in his brief supported by citation to the record. However, the record does include a letter from Boyland to Wells Fargo Bank referring to the trust

revocation and its service on Beyer. Even if we consider this evidence, it provides no support for Beyer's claim.

Because the facts regarding Boyland's conduct described in Beyer's offer of proof do not constitute extreme and outrageous conduct, the court correctly granted Boyland's motion for nonsuit on the cause of action for intentional infliction of emotional distress.

B. Intentional Interference With Prospective Economic Advantage

"In order to prove a claim for intentional interference with prospective economic advantage, a plaintiff has the burden of proving five elements: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party. [Citation.] The plaintiff must also prove that the interference was wrongful, independent of its interfering character. [Citation.] '[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' [Citation.]" (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944.)

For proof of the requirement that Boyland acted wrongfully, Beyer relies essentially upon the same evidence he offered in support of his intentional infliction of

emotional distress claim. As we explained in the preceding section, the evidence offered by Beyer does not indicate that Boyland acted wrongfully toward Beyer. Thus, his interference with a prospective economic advantage claim fails for the same reason that his intentional infliction of emotional distress claim fails.⁵

C. *Interference With Contractual Relations*

Beyer did not plead a separate cause of action for interference with contractual relations. Nor did he assert such a theory in connection with his offer of proof, in his memorandum of points and authorities in opposition to the motion for nonsuit, or during oral argument on the motion. He never moved the court for leave to assert such a cause of action. Nevertheless, he asserts for the first time on appeal that a “fair reading of the allegations reveals that Beyer alleges that *[Boyland] interfered with an actual contract as well as a prospective economic recovery.*”

“The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.”

⁵ Boyland also contends that Beyer has failed to state facts sufficient to prove that Beyer had an economic relationship with Dr. Smith or any damages. Because we hold that Beyer has failed to offer facts sufficient to satisfy the wrongfulness element, we do not address these additional arguments. Nor do we need to address Boyland’s additional argument that his conduct is not actionable because it is covered by the litigation privilege.

(*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) The tort can be “committed only by ‘strangers—interlopers who have no legitimate interest in the scope or course of the contract’s performance.’ [Citation.]” (*PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 65.)

Initially, we note the fundamental principle that a reviewing court will ordinarily not consider claims made for the first time on appeal that could have been but were not presented to the trial court. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11; *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 26, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897.) Because Beyer’s new claim could have been presented to the trial court, he has waived or forfeited the claim on appeal.

Nevertheless, there are at least two problems with Beyer’s argument. First, he has not shown the existence of any contract between him and a third party. Although he describes the Smith Trust as a “trust agreement,” a trust is not a contract. (See, e.g., *Petherbridge v. Prudential Sav. & Loan Assn.* (1978) 79 Cal.App.3d 509, 517-518; see generally, Bogert, *Trusts & Trustees*, *supra*, § 17, pp. 236-254.) Even if we were to treat the Smith Trust as a contract between Beyer and Dr. Smith, Boyland cannot be liable to Beyer for interfering with it. Boyland prepared the trust revocation for Dr. Smith, the trustor. Just as a party to a contract cannot be sued for interfering with his or her own contract, an attorney or agent for a contracting party cannot be sued on such a claim. (*PM Group, Inc. v. Stewart*, *supra*, 154 Cal.App.4th at p. 65; *Mintz v. Blue Cross of*

California, supra, 172 Cal.App.4th at p. 1604.) Thus, even if the claim had not been waived or forfeited, it is without merit.

III. DISPOSITION

The judgment is affirmed. Boyland shall recover his costs on appeal.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.